No. 79-1767

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

WILMINGTON UNITED NEIGHBORHOODS, ET AL.,
PETITIONERS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM KANTER
ALFRED MOLLIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether Section 1122(f) of the Social Security Act, 42 U.S.C. 1320a-1(f), which expressly precludes judicial review of certain determinations by the Secretary of Health and Human Services, precludes judicial review

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*Additional petitioners are Edith Beck, John J. Bradley, Frances Bradley, Joseph J. Breen, Thomas X. Carroll, Joseph G. DiPinto, Ethel B. Tynes, and Alice Wilson.

Additional respondents are Amos M. Burke, as Director of the Bureau of Health Planning and Resources Development, Robert H. Sweeney, Delaware Health Council, Inc., and Wilmington Medical Center, Inc.

when the Secretary's determination is alleged to be the product of improper influence.

2. Whether Section 1122(f) of the Social Security Act, 42 U.S.C. 1320a-1(f), implicitly authorizes federal judicial review of substantive state health care planning decisions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 615 F. 2d 112. The opinion of the district court (Pet. App. 34a-113a) is reported at 458 F. Supp. 628.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1980. The petition for a writ of certiorari was filed on May 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted Section 1122 of the Social Security Act, 42 U.S.C. (& Supp. II) 1320a-1, "to assure that Federal [reimbursement] funds * * * are not used to support unnecessary capital expenditures made by or on behalf of health care facilities * * * and [to assure] that, to the extent possible, reimbursement * * * shall support planning activities with respect to health services and facilities in the various States" (42 U.S.C. (Supp. II) 1320a-1(a))). Section 1122 authorizes the Secretary to enter into agreements with individual states, whereby otherwise available federal reimbursements for capital costs incurred by health care providers, such as depreciation and interest, may be withheld if the state has determined that such capital expenditures are inconsistent with state and local plans for the development of health care facilities.

In enacting Section 1122, Congress intended to use the purchasing power of the federal government to encourage health care providers to conform their capital expenditures to state and local plans, and thereby give added authority to those decisions. See H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 79-80 (1971). At the same time, Congress sought to minimize federal intrusion in this

area. As the House Report remarked, Section 1122 "in no way change[s] the autonomy or authority of existing State or local planning agencies * * *." *Id.* at 80.

A health care provider who plans a capital expenditure in a participating state must secure the approval of a designated local planning agency ("DPA"), which must decide whether the proposed capital expenditure is consistent with applicable state health care plans, standards, and criteria (42 C.F.R. 100.104). That determination is then forwarded to the Secretary. If the DPA has determined that the proposed expenditure conforms to the relevant state plans, the Secretary may review the decision only to determine whether correct procedures have been followed; he cannot make an independent determination of whether the expenditure complies with the state plans. If the DPA followed appropriate procedures, the Secretary must issue a determination that federal reimbursements will not be withheld (Pet. App. 6a).[1] This determination is "not * * * subject to administrative or judicial review" (42 U.S.C. 1320a-1(f)).

2. Respondent Wilmington Medical Center (WMC), a private non-profit hospital, is the principal health care provider for New Castle County, Delaware. In 1976, after more than ten years of planning and research concerning the area's changing health care needs, WMC adopted "Plan Omega," which proposed a major reorganization of WMC's principal inner-city divisions, as well as the

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[1]If the DPA has disapproved a proposed capital expenditure, the Secretary nonetheless may decide to reimburse the provider for that expenditure in certain circumstances (42 U.S.C. (Supp. II) 1320a-1(d)(2)). But the Secretary's decision to reimburse would be made only after the funds had actually been expended, so the uncertainty of reimbursement remains a significant deterrent to the undertaking of unapproved and disapproved projects.

construction of new hospital facilities in other parts of the county (Pet. App. 4a).

Because Delaware participates in the Section 1122 program, WMC applied in March 1976 to the state DPA for approval of the capital expenditures that would be required under Plan Omega. The DPA conducted public hearings and solicited recommendations from local health planning agencies (Pet. App. 6a-7a & n.1). The local agencies approved WMC's proposal, and the DPA thereafter advised the Secretary that Plan Omega was consistent with relevant state plans. In August 1976, the Secretary issued his Section 1122 approval (Pet. App. 6a-7a).

In September 1976, an action was brought by petitioner Wilmington United Neighborhoods and other parties, claiming that WMC's plan violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See *NAACP* v. *Wilmington Medical Center, Inc.*, 453 F. Supp. 280, 289-290 (D. Del. 1978).[2] The district court instructed the Secretary "to address the allegations of the complaint * * * as if it had been filed administratively and

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[2]WMC's adoption of Plan Omega has resulted in numerous legal challenges on various grounds. In *NAACP* v. *Wilmington Medical Center, Inc.*, 436 F. Supp. 1194 (D. Del. 1977), aff'd, 584 F. 2d 619 (3d Cir. 1978), certain persons who opposed the plan unsuccessfully contended that the Secretary's approval constituted major federal action requiring an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). In *Wilmington Medical Center, Inc.*, 453 F. Supp. 280, 293-303 (D. Del. 1978), rev'd, 599 F. 2d 1247 (3d Cir. 1979), the district court held that Title VI and Section 504 of the Rehabilitation Act afforded no private right of action to challenge the plan. The court of appeals reversed and remanded the case for further proceedings. The district court entered judgment for WMC on May 13, 1980 (No. 76-298), and an appeal is now pending in the court of appeals (No. 80-1893).

to determine whether Plan Omega, if implemented, [would] violate Title VI or Section 504" (*id.* at 290; footnote omitted). The Secretary thereafter undertook "an unprecedented investigation which spanned more than six months and produced a massive record exceeding six thousand pages" (*id.* at 291-292; footnote omitted). On July 5, 1977, the Secretary issued an opinion that the plan, as then constituted, would violate Title VI and Section 504. The Secretary also enumerated 12 areas in which the plan would have to be modified to achieve compliance with the statutes and applicable regulations (*id.* at 292). "After more than three months of discussions, an agreement was finally executed on November 1, 1977" (*ibid.*). Under the agreement, WMC agreed to make certain changes in its plan, and the Secretary agreed that the plan, as modified, would satisfy applicable statutory and regulatory requirements (*ibid.*).[3]

Meanwhile, in February 1977, petitioners requested that the Secretary reconsider his Section 1122 determination. On September 7, 1977, the Secretary reaffirmed that determination. Certain language appeared in the Secretary's September 7 letter, however, that may have suggested that WMC would be required to resubmit Plan Omega, in its entirety, to the DPA. On October 12, 1977, the Secretary corrected that impression in a letter which stated that resubmission of the entire plan was unnecessary and inconsistent with Section 1122 and relevant administrative regulations (Pet. App. 7a-8a).

3. Petitioners subsequently brought this action in the United States District Court for the District of Delaware,

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[3]WMC agreed: (1) to provide a transportation system for patients, employees, and visitors between the urban and suburban locations; (2) to institute a patient allocation system for services that are available at both locations; and (3) to provide facilities for the accommodation of handicapped persons (Pet. App. 7a).

challenging virtually all aspects of the Section 1122 process. Among other things, petitioners claimed that the Secretary's conclusion that WMC need not seek the DPA's approval for changes required to bring the plan into compliance with Title VI and Section 504 was the result of "the influence of a personal friend of the President" (Pet. App. 13a). Recognizing that Section 1122(f) explicitly precludes judicial review of the Secretary's decisions in this area, petitioners urged that an exception should be made when it is alleged that the decision resulted from improper influence. The district court rejected that contention (*id.* at 68a-70a).

Petitioners also argued that the statutory preclusion of judicial review did not render state DPA decisions unreviewable in the federal courts. Consequently, petitioners sought to establish that the Delaware DPA's approval of WMC's plan was substantively incorrect because it was inconsistent with the relevant state plans (Pet. App. 15a). The district court concluded, however, that Section 1122 implicitly precludes federal judicial review of substantive decisions made by state planning agencies. The district court noted (*id.* at 76a-77a; footnote omitted):

> [The Secretary] has no discretion to determine whether the proposed expenditure is unwise. The limited role of the Secretary under section 1122 clearly evinces Congress' intent to avoid Federal interference with substantive planning decisions made on the State and local level. Given the prohibition on judicial review of the Secretary's decision set forth in section 1122(f), it is inconceivable that Congress could have intended the Federal judiciary to play a more active role than the Secretary by reviewing under any standard the substance of the DPA's approval of a proposed capital expenditure.

The court of appeals affirmed, with one judge dissenting in part (Pet. App. 1a-33a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' claims warrant no further review.

1. Petitioners present two arguments in an effort to avoid the unequivocal bar to judicial review provided in Section 1122(f). First, petitioners contend that the Secretary's determination of October 12, 1977, that WMC need not seek additional DPA review of Plan Omega was influenced by Irving Shapiro, a private citizen who petitioners characterize as a "powerful advisor and friend of the President" (Pet. 21).[4] Petitioners argue that Section 1122(f) "does not explicitly preclude review of improper influence or corruption causes" (Pet. 23). Second, petitioners contend for the first time that the Secretary's determination was "not made under that statute [and] therefore, the cause is not precluded from judicial review" (Pet. 16) because it was made "on the basis of [Shapiro's] influence" (Pet. 22).

Petitioners' contentions lack merit. First, Section 1122(f) plainly and categorically precludes review: "A determination by the Secretary under this section shall

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[4]The "influence" allegedly came in the form of a letter, the full text of which is as follows: "My valued associate, Joe Dallas [Board Chairman of WMC] asked my advice on how best to place his letter before you. I agreed to send it to you, and I add my plea that you give it your attention. Its subject is of serious concern." Pet. App. 13a n.8. Mr. Dallas' letter merely recounts the history of the development of Plan Omega and suggests that the Secretary's September 1977 determination misconstrued relevant regulations to the extent that it suggested any need for further DPA review (*ibid.*).

not be subject to administrative or judicial review." 42 U.S.C. 1320a-1(f). Although petitioners contend that preclusion of judicial review is unwarranted whenever some "improper influence" is alleged, Section 1122(f) provides for no such exception, and there is no authority for asserting that the courts may create one. On the contrary, this Court has repeatedly emphasized that statutes precluding judicial review must be read to "mean what they say." *Briscoe* v. *Bell*, 432 U.S. 404, 411 (1977). See also *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89 (1978).[5]

Petitioners argue alternatively (Pet. 22) that Section 1122(f) does not preclude judicial review in this case because the Secretary's determination was not made "under the statute." That argument was not presented below, and it is not properly raised here. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, the claim is groundless. In holding that the Secretary's decision was "manifestly unreviewable" (Pet. App. 14a), the court of appeals agreed with the district court that the Secretary's October 12 letter demonstrates

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[5] In precluding judicial review Congress was mindful that the public interest requires expeditious handling of applications made by health care providers. Congress provided that DPA decisions must be made within "a reasonable period" (42 U.S.C. 1320a-(d)(1)(B)(i)), which the Secretary has defined as 90 days (42 C.F.R. 100.106(a)(4)). Unfavorable decisions made after the expiration of that period are treated as favorable decisions, and reimbursements may not be withheld. Congress certainly did not intend to countenance a delay such as this record shows.

Of course, even if there were an implied exception in Section 1122(f) in these circumstances, judicial review would be limited to determining whether the Secretary's decision was the result of any "improper influence." The Shapiro letter hardly evidences such influence. See also WMC Br. in Opp. 6.

on its face that his determination was based on his understanding of the statute and regulations (*ibid.*):

> As the October 12 letter to [petitioners'] counsel illustrates * * *, the Secretary based his decision on his interpretation of the statute and the regulations implementing it. The fact that * * * the Secretary's decision may have been influenced by a letter from a business leader and personal friend of the President is irrelevant, because * * * section 1122(f) would still preclude judicial review. *See Briscoe* v. *Bell*, *supra*, 432 U.S. at 409-15.

Moreover, as the district court noted, the Secretary's construction of the relevant statutory and regulatory materials "is clearly not an unreasonable one" (Pet. App. 69a n.52). The Secretary's determination concerned a question arising under Section 1122 and constituted a reasonable interpretation of that section. In no meaningful sense can the determination be said not to be "under" Section 1122.[6]

2. Petitioners also contend (Pet. 24-30) that they are entitled to federal judicial review of their claim that the state DPA incorrectly determined that Plan Omega was consistent with relevant state health care plans. Because

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[6]Petitioners' reliance (Pet. 19) on *Johnson* v. *Robison*, 415 U.S. 361 (1974), is misplaced because that case involved the constitutionality of a federal statute, rather than the legality of administrative action taken pursuant to statutory authority. Similarly, *D.C. Fed. of Civic Ass'ns* v. *Volpe*, 459 F. 2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972), and *Tex. Med. Ass'n* v. *Mathews*, 408 F. Supp. 303 (W.D. Tex. 1976), do not support petitioners' position. In neither of those cases, which involved allegations of improper congressional influence in administrative decisions, did any statute preclude judicial review. Both cases considered only the proper *scope* of authorized judicial review, not the *power* to undertake review in the face of a statute that explicitly precluded such review.

Section 1122(f) explicitly precludes judicial review only of the Secretary's determinations, petitioners claim that they are free to challenge the DPA's determination in federal court. Both courts below rejected this argument, correctly discerning a clear congressional intention to preclude federal judicial review of state substantive decisions in this area. See Pet. App. 15a-18a.

The legislative history shows that Congress intended substantive health care planning decisions to be made by the states: "[Section 1122] would *in no way change the autonomy or authority of existing State or local planning agencies*, or the relationship between such agencies, either within States or across State lines." H.R. Rep. No. 92-231, *supra*, at 80 (emphasis added). As the court of appeals noted, the "surest way to change the autonomy or authority of existing State or local planning agencies' is to hold that the DPA's determinations are reviewable" (Pet. App. 16a). Congress further emphasized its intention by precluding even the Secretary from reviewing the substantive aspects of favorable decisions rendered by a DPA. Given the Secretary's expertise in matters of health care planning, "it is inconceivable that Congress could have intended the Federal Judiciary to play a more active role than the Secretary by reviewing under any standard the substance of the DPA's approval of a proposed capital expenditure" (*ibid.*). Moreover, as the court of appeals remarked, it is equally unlikely that Congress

would have provided for federal judicial review of state decisions, while prohibiting such review of the Secretary's decisions (see Pet. App. 17a).[7]

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[7]Petitioners' arguments to the contrary are insubstantial. First, petitioners assert (Pet. 15) that state autonomy cannot be a vital part of the legislative scheme because the Secretary is authorized to "reverse" DPA capital expenditure disapprovals. In fact, the Secretary cannot "reverse" a state's finding that an expenditure is inconsistent with state health care plans. At most, he may determine that federal interests would be served by using federal funds, in special circumstances, to reimburse a provider who has not secured state approval. 42 U.S.C. (Supp. II) 1320a-1(d)(2). See note 1, *supra*.

Second, petitioners assert (Pet. 27) that federal judicial review is necessary to insure "uniformity" in the nationwide administration of this federal program. That assertion is ill-founded because the very purpose of this program is to guarantee that substantive decisions will be made at the state and local levels (see Pet. App. 17a). The role of the federal government is limited to creating a financial incentive for providers to conform their expenditures to state and local plans. Petitioners incorrectly assert that the court of appeals' decision "would leave to State agencies the interpretation and application of federal regulations, with the possibility that there could be 50 different interpretations and applications" (Pet. 27; footnote omitted). No state interpretation of federal regulations is involved here. Each state develops its own health care plans, and it is appropriate that the states should interpret those plans.

Finally, petitioners' reliance on *Lakeside Mercy Hospital* v. *Ind. State Bd. of Health*, 421 F. Supp. 193, 201 (N.D. Ind.), aff'd, 547 F. 2d 1170 (7th Cir. 1976) (table), is misplaced. In that case, the district court was called upon to determine whether a hospital was automatically entitled to reimbursements when the state DPA (under the restraint of a state court injunction) failed to grant or deny approval during the time set by federal law (see page 7, note 5, *supra*). The question presented—whether the federal time limits had been tolled by the state court injunction—is clearly different from that presented here. Moreover, while the court found the evidence of alleged DPA wrongdoing unpersuasive, the court reached that issue only because a full record had been established on a motion for summary judgment. At the same time, the court indicated its view that the plaintiffs lacked standing in any event (421 F. Supp. at 206). The court of appeals' summary affirmance establishes no conflict in these circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM KANTER
ALFRED MOLLIN
Attorneys

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